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**EXAMINING THE NEXUS BETWEEN ICTS AND HUMAN RIGHTS IN UGANDA: A SURVEY OF THE
KEY ISSUES***

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Abstract

This paper examines how Uganda regulates one of its most dynamic and innovative industries: the electronic communications sector. Account is also taken of the global and regional context for this area of regulation. The paper also examines how the internet and its related application work taking care of the impact of internet governance on the legal framework for electronic communications in Uganda. The primary aim of the paper is to facilitate a solid understanding of the legal policies on ICTs and Human Rights in Uganda and also seeks to illuminate the rationale and regulatory logic of such policies with the various technological and human rights challenges that they face in Uganda. The themes taken up in this paper are summed up with the following key-words: privacy, data protection, access to information, [electronic] surveillance, internet censorship, cyber-democracy, freedom of expression and hate speech and the rule of law and good governance.

I. Introduction

The raise in the use of ICTs has given rise to new challenges. This is usually the case in the evolving world of new technologies. New technologies have led to a new debate as to what implications this could have/be having on human rights especially upon the developing world in Africa. The exponential growth of electronic forms of communication generally referred to as Information and Communication Technology (ICTs) coupled with the increased use of the computer as a medium of communication and dissemination of information and the Internet raises new human rights challenges for Uganda.

The ICT sector is undergoing tremendous changes in Uganda, with the shift from a monopoly situation as envisioned in the Uganda Posts and Telecommunications Corporation Act¹ to greater levels of liberalization/competition (and privatization) as clearly seen in the later Uganda Communications Act.²

In this paper, I review and analyze the stage at which Uganda stands in relation to the five themes we are targeting in the proposed project on the nexus between ICTs and Human Rights in Africa. Through a comprehensive literature review, compilation of statutes and cases, I analyze the legal frameworks governing the themes of focus in Uganda. The five themes forming the core of this legal and policy analysis are; the right to privacy, access to information, censorship, freedom of expression and hate speech. The nation is currently debating issues such as access to ICTs, regulation of both the mobile telephony and the Internet, and national security concerns in this era of global terrorism. The role and nexus between ICTs and human rights remains unresolved. Concerns also remain unaddressed as to what could be the nexus between ICTs and human rights. These concerns also encompass the use of ICTs and their effects on specific categories of individuals, including vulnerable groups (such as women, minorities, people with disabilities (PWDs) and children.

¹ Cap. 107, Laws of Uganda.

² Cap. 106, Laws of Uganda.

While ICT usage in Uganda is still low in a comparative global sense, it is growing phenomenally, particularly with respect to mobile telephony. The Ugandan government has adopted divergent approaches to the use and regulation of the ICT sector and there are several rationales given for this. It is also important to note that the Constitution of Uganda contains the Bill of Rights in Chapter 4 on the protection and promotion of fundamental and other human rights and freedoms. The approach being taken by the Ugandan government in relation to its ICT sector can be said to be in violation of a set of human rights principles as enshrined in its Constitution. Furthermore, Uganda has international and regional human rights obligations which it has assumed on account of being party to a host of international and regional human rights treaties ranging from the International Covenant on Civil and Political Rights (ICCPR) to the African Charter on Human and Peoples' Rights (ACHRP).

Among the key issues of concern are the questions of national security and the 'fight against terrorism', interception of private communication and correspondence, digital censorship and surveillance of the Internet as well as the interference with mobile telephone communications. Core issues still remain unresolved as to what the fate of fundamental human rights such as freedom of expression, and the right to privacy could be alongside the strong desire by the Ugandan Government to control access to information, hate speech and also carry out a censorship of both the digital and print media.

The role of ICTs in good governance and cyber-democracy remains unexplored within the Ugandan context. The Internet has opened up new possibilities for individuals and groups to seek and impart information and ideas. Yet, the internet is also a new frontier where freedom of expression is being challenged.³ This study will provide comprehensive data and critical perspectives about ICTs and Human Rights in Uganda.

II. Issues and Scope of the Proposed Research in Uganda

The proposed research will specifically focus on a selection of human rights issues in Uganda and their relationship with the development of ICTs in Uganda and in comparison with number of purposively selected African countries. In particular, the project will consider the following human rights issues as they arise within the Ugandan/African context:

- a) Questions of privacy;
- b) Access to information;
- c) The issue of Censorship and cyber-democracy, and
- d) Freedom of expression and Hate speech.

The question of cultural perceptions and habits related to Privacy issues is of particular importance. In particular, the research will seek to establish what notions of privacy exist in Uganda. Furthermore, it will also explore the manner in which access to information is

³ Amnesty International accessed at <http://www.amnesty.org/en/freedom-of-expression> on March 2, 2009.

understood, particularly regarding access to personal data, rights of nationals and non-nationals to information and various other related issues.⁴

Uganda just like several other African countries has placed the issue of ICTs at the top of its development and security agendas including the establishment of a Ministry of ICT in 2006. Uganda is currently grappling with the issue of regulation of electronic communications, mobile telephony, electronic commerce, pornography and the (mis) use of the computer. Five Bills all seeking to regulate ICTs are currently before the national Parliament, i.e., Electronic Transactions Bill; Electronic Signatures Bill; Computer Misuse Bill (the so-called Cyber Bills); Anti-Pornography Bill and the much controversial Regulation of Interception of Communications Bill. Similarly, different justifications are given for regulatory activities in the ICT sector that infringes on the rights of the individual.

There are various reasons given by the Ugandan Government for regulating its ICT sector including the desire to 'keep morals', national security and the fight against terrorism among others.

It is also important to note that the nexus between ICTs and Human Rights may be too subtle for some people in Uganda to pick interest in this topic. This is more so the case in light of the gross human rights violations such as torture, denial of the right to bail, denial of speedy trials, lack of legal representation, etc. This has had the negative effect of breeding cynicism in the Ugandan population in relation to any human rights violations within the country since such arbitrary actions on the side of the state are now taken to be 'business as usual' by the population.⁵

In this paper, I make a thorough analysis of the regulatory framework and of the human rights issues in the ICT sector in Uganda, but I concentrate mainly on the following factors:

- (a) the presence of a constitutional framework that is the basis of ICT regulation and any human rights that will be affected by ICT regulation;
- (b) national policies that have been designed and those that are in the process of being designed relating to the regulation of ICTs in Uganda; or
- (c) national legislation that affects ICT in Uganda and
- (d) International and regional legislation, consultations, working procedures or baseline forms of regulation that have a bearing on Uganda.

Globalization and regionalism are key factors to be considered in analyzing the ICT and human rights nexus in Uganda. The passing of an ICT related regulatory legislation in other jurisdictions such as South Africa, the United Kingdom, the United States of America or any other neighboring country in Africa has a spillover effect on Uganda.

⁴ In Uganda for example, the right of access to information in the possession of the State or any other organ or agency of the State is a preserve of only nationals of Uganda and does not extend to non-nationals. See Article 41 (1) of the Constitution of Uganda.

⁵ This assertion was confirmed by Col (rtd) Dr. Kizza-Besigye [Party President, FDC] in an interview with the author done on January 28, 2008.

Under the general rubric of ICTs, Governance and Human Rights, the research in Uganda focuses on the following four areas of specificity, viz., Privacy rights; access issues; censorship, and Freedom of Expression (with a particular focus on the issue of hate speech) which has been mostly prosecuted as 'inciting violence' under the Uganda Penal Code Act. 'Inciting violence' is used as a justification for regulating the use of hate speech owing to the fragile nature of the state and ethnic relations in Uganda, a country with about 65 indigenous tribes. However, inciting violence has also been used as a criminal offence to prosecute especially the political opposition figures and to stifle divergent political views and opinions within and throughout the country.

2.1 Questions of Privacy

The right to privacy is a constitutional entitlement in Uganda. Article 27 of the constitution provides for the right to privacy as follows:

- (1) No person shall be subjected to---
 - (a) unlawful search of the person, home or other property of that person; or
 - (b) unlawful entry by others of the premises of that person.
- (2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

Although the constitution provides for the right to privacy in Uganda, this right is still in the nascent stages of evolution with little legal jurisprudence in Uganda. Both the government of Uganda and some private entities continue to flagrantly violate this right through their commissions/omissions and policies, while the citizens remain ignorant of such violations or choose to take no action against the violators. Several reasons are offered by the Ugandan government for this course of action including: claims related to national security, law enforcement, the fight against terrorism and illegal immigration, administrative efficiency and welfare fraud, technological advances, technological standards, interoperability between information systems and the globalization of information among others. All these and several other factors to be investigated and enunciated in the process of the research in Uganda are said to have extraordinary pressure on the few remaining privacy safeguards in Uganda.

A critical question of investigation is whether such violation is "continuing" in Uganda in the sense that it carries on regardless of prevailing circumstances, or whether it is triggered by specific factors. The right to privacy is infringed to a great degree in Uganda.

Whereas the constitution of Uganda has a Bill of Rights in Chapter 4 including the right to privacy, the right to privacy is not an absolute right in Uganda. Thus the general view within the government officials is that limitations can be placed on the right to privacy basing on Article 43 of the constitution which reads as follows:

- (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
- (2) Public interest under this article shall not permit---

- (a) political persecution;
- (b) detention without trial;
- (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

For purposes of clarity, Article 44 of the constitution of Uganda prohibits the derogation from particular human rights and freedoms. It states:

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms---

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to fair hearing;
- (d) the right to an order of habeas corpus.

The Constitution and other laws in Uganda place limits on the enjoyment of rights including the right to privacy. The Anti-Terrorism Act⁶ provides for the interception of communication and surveillance of any person suspected of engaging in terrorist activities.⁷ However, the Constitution obliges security organizations including the intelligence services to observe human rights in the execution of their duties under Article 221.

In a bid to maintain national security and counter terrorism, the Ugandan government has passed legislation which has had drastic effects on the enjoyment of the right to privacy in correspondence and communication. A case in issue is the Anti-Terrorism Act. Sections 18 and 19 of this Act are the most relevant and deserve quoting in extenso:

18. (1) The Minister may, by writing, designate a security officer and an authorized officer under this part.

(2) An order issued by the Minister in respect of an authorized officer shall have the right to intercept the communications of a person and otherwise conduct surveillance of a person under this Act.

19. (1) Subject to this Act, an authorized officer shall have the right to intercept the communications of a person and otherwise conduct surveillance of a person under this Act.

(2) The powers of an authorized officer shall be exercised in respect of a person or a group or category of persons suspected of committing any offence under this Act.

⁶ Act No. 14 of 2002.

⁷ See sections 18 and 19 of Act No. 14 of 2002.

(3) The functions of an authorized officer shall be exercised only in respect of the person or group or category of persons described in the order.

(4) The purposes for which interception or surveillance may be conducted under this part are----

(a) safeguarding the public interest;

(b) prevention of the violation of the fundamental and other human rights and freedoms of any person from terrorism;

(c) preventing or detecting the commission of any offence under this Act;

or

(d) safeguarding the national economy from terrorism.

(5) The scope of the interception and surveillance allowed under this Part is limited to----

(a) the interception of letters and postal packages of any person;

(b) interception of the telephone calls, faxes, emails and other communications made or issued by or received by or addressed to a person;

(c) monitoring meetings of any group of persons;

(d) surveillance of the movements and activities of any person;

(e) electronic surveillance of any person;

(f) access to bank accounts of any person; and

(g) searching of the premises of any person.

(6) For the avoidance of doubt, power given to an authorized officer under subsection (5) includes----

(a) the right to detain and make copies of any matter intercepted by the authorized officer;

(b) the right to take photographs of the person being surveilled and any other person in the company of that person, whether at a meeting or otherwise; and

(c) the power to do any other thing reasonably necessary for the purposes of this subsection.

Section 20 of the Act makes it an offence for any person to obstruct an officer in the carrying out of the acts mentioned above. Section 21 makes it an offence for any

authorized officer to demand or accept a bride, money benefits or any other consideration in the performance of his/her duties under Sections 18 and 19 of the Act. Section 22 provides for the admissibility in evidence of any recording, document, photograph or other matter obtained in the exercise of the functions of an authorized officer under the above Act.

For a long time since the Anti-Terrorism Act came into force in 2002, the government has not passed any regulations to regularize/operationalise phone-tapping or the interception of correspondence or communication of suspected terrorists.⁸ This comes against the backdrop of allegations that the absence of a law operationalising phone-tapping notwithstanding, the government has nevertheless intercepted correspondence and communication and done surveillance on suspected terrorists.⁹

It is upon this background that the Ugandan government has introduced the Regulation of Interception of Communication Bill¹⁰ with a view of operationalising and making an enabling law for sections 18 and 19 of the Anti-Terrorism Act.

The Bill's main objective is to make provision for the lawful interception of and monitoring of certain communications and correspondence in the course of their transmission and postage through a telecommunication, postal or any other related service or system in Uganda.¹¹ Whereas no policy debates and actions have been from a human rights perspective in order to safeguard the right to privacy in correspondence and communication which is currently under threat if the Bill is passed into law in its current state, the Bill has met stiff resistance from a cross section of the society ranging from Parliamentarians to human rights lawyers.¹²

The approach that has been adopted in Uganda is to regulate telecommunications and internet monitoring of individuals who are suspected to be a security threat to the government and people of Uganda. The violations to the right to privacy in Uganda are mainly triggered by intolerance to divergent views. Such violations are targeted at specific individuals or groups of individuals such as the political opposition.

As MP Reagan Okumu has stated:

⁸ This assertion was affirmed by Col. (rtd) Dr. Kiiza-Besigye [Party President, FDC] in an interview with the author done on January 28, 2008.

⁹ Nalugo, M, 'We tap private conversations illegally – Minister Mbabazi,' *The Daily Monitor*, March 2, 2009, at 1.

¹⁰ Bill No. 9 of 2007.

¹¹ Nalugo, M, 'MPs to discuss phone tapping law,' *The Daily Monitor*, February 27, 2009, at 1.

¹² See, 'Do not sacrifice civil liberties,' *The Daily Monitor*, March 3, 2009 at 2; Odyek, J & P. Kiwuuwa, 'Mbabazi defends phone tapping Bill,' *The New Vision*, March 3, 2009 at 1; Naturinda, S & M. Nalugo, 'MPs vow to block phone tapping Bill,' *The Daily Monitor*, March 4, 2009, at 1; Nalugo, M, 'How the phone tapping Bill will affect you,' *The Daily Monitor*, March 7, 2009 at 1; Nalugo, M, 'Lawyers oppose phone tapping Bill,' *The Daily Monitor*, March 7, 2009, at 1; Mwebe, H, 'Why MPs should support the phone tapping Bill,' *The New Vision*, March 7, 2009; Kakungulu-Mayambala, 'Phone tapping Bill a human rights concern,' *The New Vision*, March 11, 2009; Kakungulu-Mayambala, 'Before you tap my phone...' *The Sunday Monitor*, March 8, 2009; Nalugo, M., & I.Musa Ladu, 'MPs resummon Mbabazi over phone tapping Bill,' *The Daily Monitor*, March 11, 2009; Ejiet, A., 'Phone tapping bill: fishers of men in for big business,' *The Sunday Monitor*, March 8, 2009; Candia, S., 'Amnesty raps phone-tapping Bill,' *The New Vision*, September 2, 2008; BBC, Row over phone-tapping in Uganda, accessed at <http://www.news.bbc.co.uk/1/hi/world/africa/7926367.stm>

The Government is now moving towards legalizing what they have been doing. Security organs have been tapping people's phones especially for those of us who are in the opposition. Is there anything new? My only worry is that the system may turn out to be expensive.¹³

The levels of awareness of these issues among the populace though still at low levels in comparison to other jurisdictions is actually increasing and there has been some cases and complaints alleging violations of the right to privacy against the government, its agencies and private individuals in Uganda. For, example, a man, who the Uganda Police paraded before the press over a traffic offence, has petitioned the Uganda Human Rights Commission, alleging a violation of his right to privacy.¹⁴

The right to privacy in relation to correspondence has so far been litigated upon in one case in Uganda. In the much recent case of *Victor Juliet Mukasa & Yvonne Oyo v. The Attorney General*,¹⁵ the applicants brought this application by Notice of Motion under Article 50 of the Constitution and the Rule 3 of (Fundamental Rights and Freedoms) (Enforcements Procedure) Rules for Orders of enforcement of their fundamental rights and freedoms under Articles 27, 23(1) and 24 of the Constitution, allegedly breached by the respondent or its agents and damages for the said breach. The 2nd applicant who was a Kenyan student at Makerere University at the material time resided part-time with her friend the 1st applicant at her home in Kireka, a Kampala suburb.

On the 20th July at about 6:30 pm, she was alone at home when two men knocked at the door. She opened the nail clip and the door a bit to see who they were, but they pushed the door forcibly and aggressively and forced themselves inside.

In the process, one of the men later identified as the LC1, Chairman Kireka (hereinafter referred to as "The Chairman", for brevity) violently pushed her and caused her to fall on the mat. Once inside the house, the Chairman proceeded to open and rummage through the bookrack and box and searched through documents and CD's in the box; while both men shouted at her and manifested an aggressive posture towards her. When she asked for identification, one of the men told her that he was the LC1 Chairman.

The Chairman then seized a CD, some papers, and one or two booklets and a box of diskettes which he handed over to the other man. He then took a green folder. Then he ordered the 2nd applicant to dress up and get out of the house. When she asked why he had taken her friend's documents, the second man shouted at her and ordered her not to question the Chairman. She was made to forcibly dress up and was

¹³ *The New Vision*, Wednesday, May 30, 2006, p.3. For an excellent discussion of the right to privacy in Uganda, see, R. Kakungulu-Mayambala, *Privacy, Data Protection and National Security: Analyzing the Right to Privacy in Correspondence and Communication in Uganda*, HURIPEC Working Paper, 2009. See also R. Kakungulu-Mayambala, *Phone-tapping and the Right to Privacy: A Comparison of the Right to Privacy in Communication in Uganda and Canada*, accessed at [http://www.bileta.ac.uk/Document%20Library/1/Phone-tapping%20and%20the%20Right%20to%20Privacy%20\[Ronald%20Kakungulu\].pdf](http://www.bileta.ac.uk/Document%20Library/1/Phone-tapping%20and%20the%20Right%20to%20Privacy%20[Ronald%20Kakungulu].pdf) on March 6, 2009.

¹⁴ Ssempogo, H, 'Man Sues Police over Media Exposure,' *The New Vision*, June 26, 2008 accessed at www.newvision.co.ug on March 6, 2009.

¹⁵ HC Misc. Cause No. 247/06.

taken from home. She was then forced along the road, with the LC1 Chairman aggressively pushing her along the way.

The 1st applicant deponed that she was a tenant of rented premises at Kireka, a Kampala city suburb. The 2nd applicant was her visitor. On the 20th July 2005 at about 8pm, she returned home to find her house was padlocked from outside. The 2nd applicant was nowhere in sight. This was strange because she expected her visitor to be at home at that time and to lock the house from inside. Upon inquiry from the neighbours, they didn't know the 2nd applicant's whereabouts. She began searching the local establishments in the area to find out if anyone had seen the 2nd applicant. She later got to know the 2nd applicant had been arrested and detained.

As she had not been inside her house since the time of the raid, she did not know what had been taken from her house, but the 2nd applicant immediately realized that there was a CD, a box of diskettes and some documents that were withheld. The O.C (Kireka Police Post) admitted that the CD was not there but denied that any other items were missing. He said "the Chairman has taken the CD to town. I will give it back to you tomorrow." He told her to return to the police station the next day. The next day, Friday 22nd July, 2005, she went to the police station again, and was not given the CD. She was however concerned that perhaps other items would be taken so she went to her house for the first time since discovering that men had forced their way into it.

When she entered the house, she was dismayed to find that it had been ransacked. The stool was knocked over on its side and her property had been thrown around the house. Her official documents and papers from the book rack and box were scattered on the floor. There were also important documents, a CD and a box of diskettes that were indeed missing. The whole house was in disorder. Her heart sank to find her property invaded and her work rampted, destroyed and taken for no reason. The CD was later returned to her by the LC1 Chairman.

It was argued for the applicants that the acts of the police, LDU's and the Chairman were high handed, illegal, humiliating, and did not only cause them grief, injury and apprehension, but above all, these acts were a breach of several constitutional rights which are guaranteed by the Uganda Constitution which the Police, LC1 Chairman and the LDU's are enjoined to protect and defend. They were acting in the usual course of employment and the Attorney General was therefore liable. It was also argued on behalf of the applicants that the above actions were of gross violation of several International Human Rights Instruments to which Uganda is a signatory.

Some of the issues framed for determination by the court were whether the right to privacy of the person, home and property guaranteed by Art. 27 of the Constitution (forceful ingress of the LC1 Chairman of Kireka Zone into the 1st applicant's house) was violated? Whether there was unlawful interference with the applicant's privacy? Whether there was an unlawful search of the 2nd applicant's premises and whether the 1st applicant's right to property was interfered with?

Learned counsel for applicants invited court to answer all the above issues in the affirmative and award his clients general damages of at least shs 10 million each. His

argument was based on the principle that a person's dignity is guaranteed by the constitution and should not be injured by any one.

Stella Arach-Amoko, J., held thus:

In respect of the 1st applicant, the evidence of record shows that the police did not handle her documents properly. They gave the LC1 Chairman unlimited access to the said documents even after he had handed them over to Police, and detained the said documents over night without entry in their books in accordance with the laid down procedures. She is accordingly awarded 3 million shilling for violation of her rights to property contrary to article 27(2) of the Constitution which reads:

(2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication, or other property.¹⁶

The judge awarded shs10m to the 2nd applicant and shs3m to the 1st applicant.

The practical methods and approaches that can be adopted to harness the debate and defense of privacy rights and the enactment of privacy rights based on national policies and the growth of legal jurisprudence and ensure the safeguarding of privacy rights and issues lies in increased advocacy, research and public interest litigation for these rights in Uganda.

There is a strong need to create an understanding of the basic rules and principles for protecting the right to privacy and personal information, particularly as laid down within the legal framework in Uganda and its international human rights obligations among the populace. The general public needs to understand and gain insights into the myriad regulatory challenges in this field. Further, the potential for technological developments to both threaten and enhance protection of the right to privacy needs to be debated especially through the adoption of country specific privacy rights awareness programs. Advocacy groups in Uganda should develop and disseminate policy briefs and advocacy materials in this area.

2.2 Access to Information

In recognition of the role of knowledge and information gathering in individual and community development, the Constitution of Uganda provides for the right of access to information in Article 41 which states that:

- (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person.

¹⁶ Nsamba, H., (2009), Government to pay suspected lesbians sh13m, *The New Vision*, January 8, 2008.

Article 41 (2) empowers Parliament to make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information. Parliament has already enacted a comprehensive law on access to information in Uganda entitled the Access to Information Act of 2005.¹⁷

It is a fact that ICTs are the fastest mechanism through which access to information is being driven. Their impact on how much information is accessible is fundamental and the limitation of the dissemination of information through ICTs is in itself a hindrance to growth and development in various ways.

There however still exist some restrictions in relation to access to print and electronic dissemination through ICTs mainly due to the old colonial laws on both the print and electronic media. Draconian penal provisions coupled with constant threats by the Government to 'sort out the media and its errant journalists,' leave little room for a free media, print or electronic that can actively and meaningfully inform the public.

Since access to the print and electronic information dissemination is greatly hindered in Uganda, this has had the effect of denying the masses such information however vital, and the populace cannot therefore use such information however empowering it may be.

These developments are significant for transparency. The lack of transparency with which public affairs are conducted has led to a culture of 'officialdom' and 'secrecy' which makes it extremely hard to access information. For example, the government of Uganda through the Solicitor General initially refused to hand over Production Sharing Agreements (PSAs) relating to oil explorations in Western Uganda to Members of Parliament on the Parliamentary Committee on Natural Resources citing national security and confidentiality clauses contained in the documents.¹⁸ It was only after a protracted battle that Parliament received the agreements between the government and several oil exploration companies in early 2009 all the way from 2006 when the said agreements were first finalized.¹⁹ It is unclear however if the information contained in the agreements will eventually become public.²⁰ Although this is a clear sign of lack of transparency and accountability on the side of the Government of Uganda to its citizenry, such government actions have always been justified under the law in Uganda. One such law is the Official Secrets Act,²¹ which makes it a criminal offence for a public officer to wrongfully communicate official government secrets likely to prejudice State security.²² Similarly, a public official who acts in a manner likely to

¹⁷ Act No. 6 of 2005. For an excellent overview of the scope and applicability of this legislation, see Henry M. Onoria, *Realization and Enforcement of the Right of Access to Information in Uganda, 1995-2005*, Makerere Law Journal.

¹⁸ Bainomugisha, A., et al, (2006), *Escaping the Oil Curse and Making Poverty History: A Review of the Oil and Gas Policy and Legal Framework for Uganda*, ACODE Policy Research Series, No. 20, ACODE, Kampala at 18-19.

¹⁹ Izama, A., 'Parliament receives oil agreements,' *The Daily Monitor*, February 28, 2009 at 1; Katusiime, D., 'Transparency will save Uganda from oil curse,' *The Daily Monitor*, March 12, 2009; Balyesiima, A., 'Oil testing, burning successful – Tullow,' *The Daily Monitor*, March 12, 2009 .

²⁰ *Id.*

²¹ Cap. 302 Laws of Uganda.

²² *Id.* section 4.

prejudice the interests of his employer [Government or a public company] can also be charged with the criminal offence of abuse of office under section 87 of the Penal Code Act.²³ Divulging to third parties information which is prejudicial to the employer is a clear example of abuse of office and indeed against the long established rule of 'officialdom' in the public service.

These are some of the limitations imposed by the government which affect the enjoyment of the human right of access to information. Although there are some remedial processes that are available to such hindrance such as securing a court order directing the public officer to surrender such information as may be necessary, the process associated with is very costly to the ordinary Ugandan. The few individuals who have successfully utilized such avenues have been mainly the political elite. The fact that the access to information however vital is not automatic in certain instances since it involves making a special application to the government agency holding such information is a hindrance to access in itself.

A case in point is in *the Matter of Jim Muhwezi Katugugu v. Patrick Kiggundu & Anor*,²⁴ in which at the commencement of the hearing of these consolidated petitions (No's 4 of 1998 and 6 of 1998), counsel for the Attorney General, took a preliminary objection on a point of law, that the petitions were incompetent for contravening section 15 (1) of the National Assembly (Powers and Privileges) Act (Cap 249) in that they were relying on documents which emanated from Parliament, as evidence without prior leave of Parliament or Assembly. Secondly, that they were relying on public documents that were not properly before court as required by section 75 of the Evidence Act. It was submitted for the Attorney General that section 15 (1) must be interpreted as intended to protect the dignity and immunity of Parliament. It is meant to protect the proceedings and evidence given before Parliament from being used as evidence outside it without prior leave of Parliament.

Section 15 (1) reads:

Save as provided for in this Act, no member or officer of the Assembly and no person employed to take minutes of evidence before the Assembly or any committee shall give evidence elsewhere in respect of the contents of such minutes of evidence or of the contents of any document laid before the Assembly or such committee, as the case may be, or in respect of any proceedings or examination held before the Assembly or such committee, as the case may be, without the special leave of the Assembly first had and obtained.

- (2) The special leave referred to in sub-section (1) of this section may be given during a recess or adjournment by the speaker or in his absence or other incapability or during any dissolution of the Assembly by the Clerk."

There was no evidence that the said committee granted permission to the two members of Parliament, Hon. Muhwezi and Hon. Kiggundu to use the proceedings of Parliament in this court.

²³ Cap. 102, Laws of Uganda.

²⁴ Constitutional Cause No. 4/1998.

Counsel for the Attorney General produced a letter dated 3rd April 1998 from the Speaker's chambers as leave for the Attorney General to use the copy of the record of Parliamentary proceedings of 17/2/98 and 18/2/98 in this court for the defence of the petitions. Counsel for the Attorney General also contended that the documents being public documents within the meaning of section 72 of the Evidence Act, only their certified copies issued by the officer in-charge of their custody, on payment of appropriate fees, could be received in evidence under section 75 of the Evidence Act. He submitted that in the instant petitions, what were annexed were not certified copies of the documents in question. Therefore, they are not admissible in evidence.

Counsel for the petitioners contended that if the court held that section 15 (1) applies to the documents in question, the objection would still fail by virtue of Articles 41 and 273 of the constitution of Uganda. They argued that Article 41 gives the citizen the right of access to information in possession of the State. The documents in question are information in possession of the State. The interpretation should be that the documents in question are information which is not prejudicial to the security of the State or the privacy of an individual and therefore, not subject to section 15 (1).

In response, counsel for the Attorney General contended that information in possession of the State should first be applied for in the manner provided for by the law to access it. In the instant case, section 15 (1) provided the manner of seeking access to the information in the documents in question. But the petitioners did not comply with that procedure. There the Article does not apply.

The court concluded thus:

... we think that Articles 41 and 273 were cited out of context. They are irrelevant as the admissibility of the documents complained of is being resisted not because they are prejudicial to the security of the State or the privacy of an individual. Rather, the admissibility of the documents is being challenged because the information therein is restricted under section 15 (1) which provides the manner of accessing them. We find no merits in this argument ... We accordingly uphold the objection and strike out the petition.

In the latter case of *Paul K. Ssemwogerere and Anor v. Attorney General*,²⁵ the petitioners alleging that the Referendum and Other Provisions Act 1999 was null and void on the grounds that it had been passed at a time when Parliament did not command a quorums in accordance with the constitution needed to rely on the official record of Parliament – the Hansards – in support of their petition. The second appellant obtained special leave of Parliament to give evidence in the Constitutional Court in respect of the Hansard and proceedings. This was the case because the Constitutional Court had earlier on ruled to the effect that appellants could not give evidence in respect of the Hansard proceeding in the absence of leave of Parliament. In this case however, the Supreme Court held that there was nothing to stop the petitioner from giving evidence on record of Hansard proceedings with or without leave of Parliament.

²⁵ Supreme Court Const. Appeal No. 1 of 2000.

The Supreme Court in the Paul Ssemwogerere case revised the legal position as given in the case of Jim Muhwezi.

It is important to observe that of the numerous Commissions of Inquiry set up by government and funded using public funds on various matters of public interest many have never been made public ten or twenty years after the Commissions' work ended.²⁶

However, the awareness of such remedial processes is generally lacking among the general populace. Of the policy changes necessary to facilitate the role of ICTs in the enjoyment of human rights and the development process especially in relation to the right of access to information in Uganda is that the culture of 'officialdom' and 'secrecy' within the government and its public officials should end.

2.3 Censorship

Digital censorship remains a contemporary issue the world over, the most common rationale offered for doing so being national security, and the ever-latent threat of terrorism. Against this background, an attempt is made at gathering scientific evidence on the extent of digital censorship in Uganda. Censorship is mainly carried out in the form of threats to digital content which contains divergent views to those generally espoused by the government. In most cases, the 'offending' websites/publishers of such content have been asked to remove the 'offending' content or risk the wrath of the government much opposed to the said content. In severe and extreme cases however, the government has gone ahead to either shut down the media house publishing the 'offending' digital content or to totally shut down the website. The main reason why this censorship has been carried out is largely due to intolerance to divergent views. Censorship of digital content by mainly the government of Uganda is widespread and gets to its height mainly at the time of national elections such as the District, Parliamentary and Presidential elections at which time any digital content carrying any message against or contrary to the main views held by the government policy or campaign manifesto is treated harshly and with an iron-hand.

In Uganda, at the height of the February 2006 Presidential and Parliamentary Elections, the Government of Uganda banned Radio Katwe an Internet satellite TV and Radio station for allegedly spreading malicious propaganda against the government through the Uganda Communication Council (UCC), the body mandated to regulate communication in Uganda including Information, Communication Technology (ICTs) like the Internet.²⁷ The government-controlled UCC directed Uganda's leading

²⁶ Examples include the Commissions of Inquiry on the Closure of Banks, the Uganda Police Force, Hon. Kayira's murder, the shooting of two Makerere University students in the early 1990s, to mention but a few.

²⁷ See the *New Vision*, 21st February, 2006 at <http://www.newvision.co.ug/D/8/13/483221>. This just serves as an iceberg of how the repressive regimes in the less democratic societies in Asia and Africa are far from embracing the Internet as being part of the democratic process. For an excellent and detailed overview of internet censorship in Africa, see R. Kakungulu-Mayambala, (2008), *Internet Censorship and Freedom of Expression: A critical Appraisal of the Regulation of Hate Speech on the Internet*, accessed at

telecommunications company and Internet Service Provider (ISP), MTN, to block the site.²⁸ The Uganda Communications Act empowers the Commission to direct any telecoms operator to operate networks in such a manner that is appropriate to national and public interest.²⁹ Another way through which the government is able to exert pressure on the ICT sector which may result into digital censorship is through the licensing requirement for radio communication and telecommunication licence.³⁰ Any communications company which does not follow the government line may be denied a licence since the licensing agency – UCC – is government-controlled. This had led to self digital censorship on the side of the communications companies for fear of having their licences not renewed by the government.

Although the Uganda Communications Act provides for that the UCC shall exercise its functions independent of any person or body,³¹ the fact on the ground is that the commission is actually government-controlled and is not independent as stated in the Act. The Act also establishes a tribunal and office of technical advisers with the mandate to hear and determine all matters relating to communications services arising under the Act.³² The independence of this tribunal is yet to be determined. However, it is a good structure which can be exploited in the case of disputes involving digital censorship in Uganda, since the tribunal is to be headed by a High Court Judge assisted by not more than four technical advisers.

Digital censorship limits the right of access to information and also curtails cyber-democracy and freedom of expression on the Internet. Digital censorship runs counter to Uganda's domestic and international human rights obligations and international law in general.

The remedial courses of action that would be available to address the situation entail the development of a culture of tolerance to divergent opinions especially among the politicians in Uganda.

There are also non-political causes of digital censorship based on moral and cultural grounds. The fight against digital content on any materials alleged to be containing lesbian, gay, bisexual and pornography content is quite intensive. The Church and other religious groups have been the leading crusaders in this 'fight.' News papers like the local daily *Bukedde* [a sister paper of the government owned New Vision newspaper] and the tabloids *Redpepper* and the *Onion* have been the main target. This brings on to the scene other stakeholders and non-state parties that could be in violation of human rights. The research therefore needs to investigate what course of action would be available in cases where this occurs. The government has a Bill – the

[http://www.bileta.ac.uk/Document%20Library/1/Internet%20Censorship%20and%20Freedom%20of%20Expression%20\[Ronald%20Kakungulu\].pdf](http://www.bileta.ac.uk/Document%20Library/1/Internet%20Censorship%20and%20Freedom%20of%20Expression%20[Ronald%20Kakungulu].pdf) on March 9, 2009.

²⁸ See, Committee to Protect Journalists, *Critical Website blocked on the eve of Presidential elections*, accessed at <http://cpj.org/2006/02/critical-web-site-still-blocked-on-eve-of-presiden.php> on March 9, 2009.

²⁹ See section 4 of the Act on the functions of the commission.

³⁰ See, sections 23-27 of the Uganda Communications Act.

³¹ Section 12 of the Act.

³² See sections 75-81 of the Act.

Anti-Pornography Bill – currently before Parliament to deal specifically with any digital or hardcopy pornographic content. The law will mostly affect the many internet cafes and video halls in Uganda.

Pornography and pornographic content be it in hard copy or digital form is currently controlled in Uganda using section 166 of the Penal Code Act entitled “traffic in obscene publications/materials.” It is an old law enacted June 15, 1950 during the colonial period. The main aim of this law is to prevent “obscene publications/materials” from corrupting the morals of the people of Uganda. However, from a civil liberties/human rights point of view, the Anti-Pornography Bill 2009 raises a number of issues and fears that the bill could be a ploy by the government to curtail people’s freedoms. The Bill should be acceptable in as far as it meets the standards in a democratic environment. There should not be any warranted restriction, but the bill should adhere to find the delicate balance between freedom of expression and pornographic regulation.³³ Pornography is currently being blamed for all the social evils in Uganda such as the rampant sex crimes, and breakdown in marriages. Whereas the actual cause of such acts range from poverty, drunkardness, to lack of jobs, the government has singled out pornography as the main cause of all the current ills in society. The government also wants to control the selling of pornographic content such as the *Ki-Nigeria* porn DVDs, and the staging of stripteases – commonly known as *bimansulo*, in the bars and dance halls in Uganda. The irony and paradox of the matter is that the general public seems to enjoy such pornographic content be it in print or digital content. Indeed whenever local tabloids print naked photos of celebrities on their front pages, the papers sale so fast and all the copies are usually sold out by midday of the day of their print.

There are some legally legitimate means and justifications for conducting digital censorship such as the protection of children and minors from such digital content which may hinder their proper upbringing. However, what is currently being done in Uganda is that the digital censorship cuts across the board, and any digital content that is considered to ‘corrupt the morals’ of any person be it a minor or adult is illegal.

2.4 Freedom of Expression and Hate Speech

Freedom of speech has for long been a concern in many countries and Uganda is no exception. International recognition of this right is found in Article 19 of the Universal Declaration of Human Rights. Similarly, Uganda is a State party to the International Covenant on Civil and Political Rights which guarantees this in Article 19 and the African Charter on Human and Peoples’ Rights which guarantees the right to express and disseminate one’s opinions within the law under Article 9.

The Constitution of Uganda also guarantees freedom of expression in Article 29. Article 29 (1) (a) is worth quoting verbatim:

³³ Kalumba, R., ‘What is this fuss about Pornography?’ *The Daily Monitor*, March 5, 2009; Byenkya, A., ‘New Pornography law in place to curb the vice,’ *The New Vision*, February 5, 2009.

(1) Every person shall have the right to---

(a) freedom of speech and expression which shall include freedom of the press and other media

Whereas the Constitution of Uganda guarantees freedom of speech and expression, several events have led to the restricted use of ICTs by the government in their attempt to curtail the right to freedom of expression. The approach that the government has taken such a wire-tapping of all mobile telephony communications and internet censorship has resulted in the violation of the right to freedom of expression. The main reason given for this kind of behavior has been national security.

Another reason which has been given for curtailing freedom of expression in Uganda has been mostly related to hate speech.³⁴ The government has always referred to the 1994 genocide in neighboring Rwanda and the December 2007 post-election ethnic violence in Kenya as some of the reasons for restricting hate speech in Uganda. The question of hate speech is a controversial one; what could be considered by some as the legitimate exercise of the right to freedom of speech may be interpreted by others as hate speech.

Discussions of hate speech and its regulation have attracted considerable comment not only in Uganda but also in other countries in Africa and beyond. Those bent on regulating hate speech especially through ICTs are fortified in the role of radio and television networks in the acceleration of hate speech during the 1994 genocide in Rwanda in 1994. Owing to the fact that the internet and the mobile telephony are now widely considered the fastest and most available means and forum of disseminating hate speech across the world, the government of Uganda has been very vigilant in seeking to regulate the two means of ICT communication.³⁵

Whereas it is clear that the government in Uganda has sought to regulate hate speech, the definition of hate speech remains unclear in Uganda. It leaves one wondering as to *what really amounts to hate speech and how is it defined in the Ugandan context?*

This comes at the backdrop of many countries in Africa being reputedly not very tolerant to information or forms of expression and demonstration that would be welcome and even normal elsewhere. This hostility is premised on a perception of the need to preserve what some would regard as deep cultural values. This deep sense of obligation to preserve these values has even influenced the making or amendment of certain legislation. A case in point in Uganda is the Anti-Pornography Bill 2009 which the government argues is intended to preserve the Ugandan culture and prevent the corruption of morals in the country.

An investigation of the legal frameworks governing hate speech and how this relates to the rights to freedom of expression, privacy and the dissemination of knowledge and sharing of ideas is core. In Uganda, the criminal offence of 'incitement to violence' as

³⁴ For an excellent discussion of freedom of expression and hate speech in Uganda, see H. Odimbe-Ojambo, (2008), *Reflections on Freedom of Expression in Uganda's Fledgling Democracy: Sedition, "Pornography" and Hate Speech*, HURIPEC Working Paper No. 18.

³⁵ Kakungulu-Mayambala, (2008b), at 12-14.

provided for in section 83 (1) of the Penal Code Act has been used to regulate hate speech. Section 83 (1) provides that:

Any person who incites any other person to do an act of violence against any person by reason of his or her race, place of origin, political opinion, color, creed or sex or office commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.

Many opposition politicians who have organized political rallies and assemblies or talk shows aired on both radio and TV commonly known as *bimezza* have been charged with the criminal offence of inciting violence under section 83 (1) of the Penal Code Act of Uganda.³⁶ The legal test that would be used to determine whether some ICT-related activities violate some of the constitutional rights such the right to freedom of expression and the right to privacy in Uganda's case would be Article 43 which generally applies to limitations on the fundamental rights and freedoms in Uganda's Constitution. The test to be followed was laid down in the celebrated case of *Charles Onyango Obbo & Anor v. Uganda*,³⁷ which gave the criteria for justification of any law imposing limitation on the guaranteed rights, as follows:

- The legislation which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;
- The measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations, and
- The means used to impair the right or freedom must be no more than necessary to accomplish the objective.³⁸

The criminal offences of inciting violence and sedition have mainly been used to suppress divergent political views in Uganda. The heated debate surrounding the proposed amendments to the Land Act has led to increased charges of inciting violence not only against opposition politicians opposed to the amendments but also Radio stations and TV stations that host such politicians. Whereas it is true that there has been some inter-tribal tensions in Uganda especially between the indigenous Banyoro and the Bakiga in Kibaale and Buliisa districts and also between the indigenous Itesots and the Ankole/Rwandese pastoralists in the Teso sub-region, these tensions have since disappeared. To a small extent therefore, the government can claim success in the use of the law on incitement of violence to diffuse such inter-tribal tensions. However, the law on incitement to violence or hate speech has mainly been used to curtail divergent political views and has actually been in violation of the right to freedom of expression.

There has also been an instance in 2005 when the government regulation of ICTs and freedom of expression has had a negative gender bias. An example is *The Vagina*

³⁶ See *The New Vision*, September 9, 2007. See also the cases of *Uganda v. Betty Anywar, Hussein Kyanjo and Ken Lukyamuzi*, still on going on file number 403/07, *Uganda v. Erias Lukwago & Odongo-Otto*, on going on file number 430/07 both at Buganda Road Court. Another recent case involving incitement of violence is *Uganda v. Hon. Erias Lukwago*, CRT No. 116/08 before the Grade 1 Magistrate of Buganda Road Court.

³⁷ Const. App. No. 1 of 2000 [unreported]. See also Odimbe-Ojambo, (2008), at 9-11.

³⁸ *Obbo*, id., at 28 and Odimbe-Ojambo, id., at 10.

Monologues, the anti-violence play that women activists in Uganda wanted to broadcast through the national media and film shows to show case the violence against women in Uganda and to also raise gender awareness among the Ugandan society. The play was banned by the government citing moral issues among other reasons.³⁹ The government, through the regulatory agency, the Media Council, the body mandated to regulate the media in Uganda under the Press and Journalists Act, also felt uncomfortable with the name of the play – The Vagina Monologues.⁴⁰

The directive by the Uganda Media Council to have some parts expunged from the play before it could be broadcasted to the Ugandan audience was an affront to the right to freedom of expression. The play was very useful since its major theme was to create awareness of sexual abuse against women in Uganda, but the government denied play organizers the right to broadcast the play. Ojambo quoting Makubuya states:

I form the considered opinion that the decision of the Media Council in asking the organizers to expunge offending material [particularly on lesbianism, prostitution, obscenity] was proper and lawful with the provisions of Article 43 (1) of the Constitution and the Press and Journalists Act. I consider the offending parts to fall within the acceptable legal exceptions of freedom of expression. This is essentially because every society has a threshold/behavior, values or morals.⁴¹

However, just like Ojambo observes, Makubuya fails to provide any guidance as to how such alleged threshold ought to be determined.⁴² It is thus clear that violation of the right to freedom of expression occurs in Uganda partly because the government wants to regulate hate speech but fails to draw a clear line between what constitutes freedom of expression and hate speech. Article 43 of the Constitution and the case of *Obbo* seem to offer guidance.

2.5 A Note in Summary

The call to propriety and control over the ICT sector in Uganda is a crucial one. ICTs in Uganda are monopolized by a few players. There are five mobile telephony service providers, i.e., MTN, Uganda telecom, Zain, Warid and Orange.⁴³ Although this is not a monopoly situation like was the case with the Uganda Posts and Telecommunications Corporation before the liberalization of telecommunications in Uganda in the late 1990s, it is clearly a perfect case of oligopolists. It is these same mobile telephony service providers who are also the dominant Internet Service Providers alongside a few other ISPs. The internet industry is controlled by a few players and this makes internet to

³⁹ BBC, Uganda ban on Vagina Monologues, accessed at <http://news.bbc.co.uk/2/hi/africa/4277063.stm> on March 12, 2009.

⁴⁰ For an excellent discussion of the decision of the Media Council, see F.W. Jjuuko, (2005), '*To Ban or Not to Ban*' A Critique of the Media Council Ruling, 11 East African Journal of Peace & Human Rights and A. Makubuya, (2005), *The 'Vagina Monologues' Saga and Free Expression in Uganda*, 11 East African Journal of Peace and Human Rights.

⁴¹ Odimbe-Ojambo, op.cit. at 21.

⁴² *Id.*

⁴³ Jaramogi, A., & D. Muwanga, 'Orange launches in Uganda,' *The New Vision*, March 11, 2009.

be very expensive almost 10 times its cost in the developed world. Similarly, due to the fact that internet industry is controlled by the same players that control the country's mobile telephony, the mobile telephony too is also almost 10 times its cost in the developed world.

The situation is aggravated by the high taxes and the government requirements imposed on the service providers such as the government requirement for all mobile telephony service providers to avail government with unlimited access to information about their customers and to also keep all their customers communications for at least six months as provided for in the Regulation of Interception of Communications Bill 2009.⁴⁴ The financial burden incurred by the mobile telephone service providers in collaborating with the government on wire tapping its citizenry shall be met by the mobile telephony customers and this will make the service even more expensive.⁴⁵ Service providers are pressed into compliance through the offer of incentives such as tax waivers. However, the human rights implications are far reaching.

The proposed law on pornography is intended to protect vulnerable and marginalized groups, especially women and children. Use of the internet has attracted legitimate concerns among children's rights activists on issues such as child pornography and prostitution. How to balance the rights of the other interest groups alongside those of the vulnerable and marginalized groups remains a matter of concern.

⁴⁴ See sections 8-12 of the Bill.

⁴⁵ Wandera-Ogalo, (2007), Comment on the Interception of Communications Bill, Submitted to Members of Parliament on the Proposed Bill [Unpublished paper on file with the author]

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International Legislation

The UN Charter

The Universal Declaration of Human Rights (UDHR)

The International Covenant on Civil and Political Rights (ICCPR)

The African Charter on Human and Peoples' Rights (ACHPR)

Domestic Legislation

The Constitution of Uganda, Cap. 1, contains the Bill of Rights

Access to Information Act, No. 6/2005

Press and Journalists Media Act

Anti-Terrorism Act, No. 14/2002

Penal Code Act, Cap. 102

Official Secrets Act, Cap. 302

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